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8 Go Daddy Software, Inc.

9 UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 Equal Employment Opportunity
12 Commission,

13 Plaintiff,

14 v.

15 Go Daddy Software, Inc.,

16 Defendant.

Case No. CV 04 2062 PHX DGC

**DEFENDANT'S MOTION IN
LIMINE REGARDING
EMOTIONAL DISTRESS AND
PUNITIVE DAMAGES**

17 **I. INTRODUCTION**

18 Defendant Go Daddy Software, Inc. (now known as Go Daddy.com, Inc.)
19 ("Go Daddy"), by and through undersigned counsel, moves for an Order excluding any
20 evidence regarding emotional distress or punitive damages. In its Initial and Supplemental
21 Disclosures, Plaintiff has not provided any basis for, or calculation of, Mr. Bouamama's
22 emotional distress estimates or punitive damages. As such, this Court should exclude any
23 evidence regarding these alleged damages.

24 **II. LAW AND ARGUMENT**

25 In both its Initial and Supplemental Disclosure Statements, Plaintiff simply stated:

26 With respect to non-pecuniary compensatory and punitive
27 damages, this is an issue for the fact finder, if appropriate, and
28 there is not method to compute these damages with precision.
The Commission, however, recognizes that non-pecuniary
compensatory and/or punitive damages are subject to statutory

1 limitations, which will be determined during the course of
2 discovery.

3 To date, Plaintiff has not provided a calculation or breakdown regarding the amount of
4 compensatory or punitive damages it is seeking on behalf of Mr. Bouamama.

5 Rule 26(a)(1)(C) provides that a party is required to disclose:

6 a computation of any category of damages claimed by the
7 disclosing party, making available for inspection and copying as
8 under Rule 34 the documents or other evidentiary material, not
9 privileged or protected from disclosure, on which such
computation is based, including materials bearing on the nature
and extent of the injuries suffered.”

10 FED. R. CIV. P. 26(a)(1)(C). That Rule also “imposes a burden of disclosure that include the
11 functional equivalent of a standing Request for Production under Rule 34.” Adv. Cmte.
12 Notes, 1993 Amendments to Fed. R. Civ. P. 26(a)(1)(C).

13 Rule 37(c)(1) provides that a party’s failure to disclose information required by
14 Rule 26(a), without substantial justification, bars use of that evidence at trial or on any
15 motion, unless such failure is harmless. FED. R. CIV. P. 37(c)(1). Rule 37(c) is “self-
16 executing” and “automatic,” requiring no prior motion or order. Adv. Cmte. Notes, *supra*.
17 Plaintiff (not Defendant) has the burden to prove that the conduct was substantially justified
18 or harmless, otherwise the evidentiary exclusion is mandatory under the language of
19 Rule 37(c)(1). *Ortiz-Lopez v. Sociedad Espanola*, 248 F.3d 34 (1st Cir. 2001). As an
20 additional remedy, the Court may impose any of the sanctions set forth in Rule 37(b)(2)(A),
21 (B), and (C), such as the establishment of particular matters of proof, the refusal to permit a
22 party to support or offer evidence of its claims, striking portions of the pleadings, and
23 dismissing claims. Without prior disclosure, Plaintiff cannot present evidence of damages at
24 trial. *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1081-82 (1st Cir. 1989) (refusal
25 to produce documents regarding damage claims barred use of documents at trial).

26 Plaintiff cannot present the Court with any substantial justification for its tactics.
27 While not a science, decades of federal precedent and jury instructions have developed
28 standards for calculating emotional distress and punitive award damages. *See, e.g., Carey v.*

1 *Piphus*, 435 U.S. 247, 248 (1978) (emotional distress award requires proof of actual injury);
 2 *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 378 (5th Cir. 2000) (emotional distress
 3 damages for retaliation verdict in Title VII action reduced from \$300,000 to \$10,000 where
 4 the sole evidence of damages was the plaintiff's testimony).

5 Plaintiff will ask the jury to award a sum for emotional distress damages without
 6 providing any basis for Mr. Bouamama's entitlement to that amount. If Plaintiff cannot
 7 provide jurors with a basis for its estimate, it should hardly expect jurors to reasonably
 8 formulate their own basis for an emotional distress damages award.

9 **III. CONCLUSION**

10 Accordingly, Defendant respectfully requests that the Court enter an Order precluding
 11 Plaintiff from introducing evidence of emotional distress or punitive damages.

12 RESPECTFULLY SUBMITTED this 15th day of September, 2006.

13 s/ R. Shawn Oller
 14 J. Mark Ogden
 15 Steven G. Biddle
 16 R. Shawn Oller
 LITTLER MENDELSON, P.C.
 Attorneys for Defendant
 Go Daddy Software, Inc.

17 I hereby certify that I electronically
 18 transmitted the attached document
 19 to the Clerk's Office using the
 20 CM/ECF System for filing and
 21 transmittal of a Notice of
 22 Electronic Filing to the following
 CM/ECF registrants, and mailed a
 copy of same to the following if
 non-registrants, this 15th day of
 September, 2006:

23 Mary Jo O'Neill, Esq.
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